QUESTIONS PRESENTED

1. Whether the Fourth Amendment principle that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants, should be overruled.

2. Whether the good faith exception to the exclusionary rule applies where police officers obtain physical evidence while conducting a warrantless search pursuant to an unconstitutional procedural search statute, and while conducting the search, the officers exceed the bounds of the unconstitutional statute.

3. Whether the good faith exception to the exclusionary rule should be applied on a retroactive basis.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF ILLINOIS,

Petitioner,

vs.

ALBERT KRULL, GEORGE LUCAS
and SALVATORE MUCERINO,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Prior to the warrantless entry onto the business premises of Action Iron & Metal, Inc., various auto yards regulated by Ill. Rev. Stat. Ch. 95½, Section 5-401(e) (1981) filed a Complaint on July 21, 1980, in the United States District Court for the Northern District of Illinois to declare Section 5-401(e)

unconstitutional.[1]

The suit, captioned Bionic Auto Parts, et al. v. Fahner, et al., 518 F.Supp. 582 (N.D. Ill. 1981), was filed in the United States District Court for the Northern District of Illinois against the Illinois Attorney General, the Chicago Police Department, the Illinois Secretary of State and the State's Attorney of Cook County [hereinafter referred to as the District Court Proceedings].

While the constitutional question was under consideration by the District Court, Detective Leland McNally, Badge No. 12157, an agent of the Chicago Police Department, entered the premises of Action Iron & Metal, Inc. on July 5, 1981, at approximately 10:30 a.m. for the ostensible purpose of performing a records inspection pursuant to Ill. Rev. Stat., Ch. 95-1/2, Section 5-401(e) (1981). Detective McNally did not have a search warrant or arrest warrant. There was no probable cause for any of the officers to believe a crime was being committed or, in fact, had been committed.

Based upon the fruits of the search

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[1]Sections 5-401 et seq. provided for administrative searches for certain purposes of businesses engaged in acquiring, wrecking, recycling, rebuilding and/or selling automotive parts.

and seizures, Respondents were charged with various motor vehicle violations involving either possession of stolen motor vehicles, failure to surrender proper certificates of title or failure to obtain a junking certificate as required by statute. (Ill. Rev. Stat., Ch. 95-1/2, Sections 4-103(a)(1), 4-103(a)(4), and 3-116(c) (1981)) [hereinafter referred to as the State Court Proceedings].

On July 5, 1981, Respondent Krull and Action Iron & Metal, Inc. filed a Complaint for Injunctive and Declaratory Relief. Respondent's Complaint was consolidated with the Bionic Auto Parts case referred to above.

On July 6, 1981, Judge Milton I. Shadur held Section 5-401(e) unconstitutional in the District Court proceedings. The Court specifically found that the Statute failed to clearly define regular enforcement procedures pursuant to the requirements of Donovan v. Dewey, 452 U.S. 594 (1981).

During the proceeding before the District Court, the State stipulated that Defendant Lucas did not consent to the search and that Lucas only agreed to Detective McNally's entry onto the premises because he believed he had no choice pursuant to Section 5-401(e). A copy of the Stipulation filed with the United States District Court is included

in the Joint Appendix at 38.[2]

Based upon the District Court's decision, Defendant Krull moved to suppress evidence in the State Court proceedings. The motion was adopted by all Defendants. At the hearing on September 25, 1981, the motion was granted.[3]

The trial court found that the search authorized by Section 5-401(e) was a "two-step" process. First, the officer is entitled to examine the records required to be kept by the licensee. Second, the officer then may search the

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[2]The briefs for the Petitioner and the Amicus ignore this critical Stipulation of Fact. The Stipulation also demonstrates that Petitioner's assertion that the District Court proceedings were "unrelated" to the State Court proceeding is also incorrect. (Pet.'s brief at 3).

[3]Interestingly, the Petitioners argue that should this Court decide in their favor that the ruling should be applied retroactively because the Court should decide all cases before it "in accord with existing constitutional standards" regardless of whether those standards were in effect at the time the case arose. (Pet's. Brief at 13 f.n.4). Yet at the same time the Petitioner argues that the trial court should not have suppressed the evidence in the instant case where the regulatory statute was declared unconstitutional after the arrest but before the trial court ruled on the motion to suppress.

business premises for the limited purpose of verifying that the records are accurate.

However, the trial court determined that Detective McNally exceeded his authority under the statute. Detective McNally conducted a search of the entire business premises and that search was not limited to a verification of the records. The trial court rejected the State's argument that even if McNally exceeded the scope of the statutory authority, the search was proper because it was conducted pursuant to Defendants' consent. The State appealed to the Illinois Appellate Court.

Prior to the decision of the Illinois Appellate Court, the decision of the District Court was appealed to the Seventh Circuit Court of Appeals. During the pendency of the federal appeal, the Illinois Legislature promulgated Section 5-403 (eff. Jan. 1, 1983) to eradicate the constitutional deficiencies found in the prior statute by the District Court.

In light of the new enactment on August 23, 1983, the Seventh Circuit determined that Section 5-403 as enacted was constitutional. The Seventh Circuit specifically declined to review the District Court's ruling that Section 5-401(e) was unconstitutional. The decision of the District Court was affirmed in part and vacated in part on other grounds.

The Illinois Appellate Court was advised of the Seventh Circuit's deci-

sion. On November 23, 1983, the Illinois Appellate Court vacated the trial court's order and remanded the case to the trial court to consider certain specific questions. First, the trial Court had to determine if the as yet unadopted "good faith" exception to the exclusionary rule, validating as proper an otherwise improper evidentiary seizure, should be applied to this case. Second, the trial court had to determine if the new standard was to be applied, whether the police officials, as a matter of fact, acted in "good faith" in conducting the instant search and seizure. Third, the trial Court had to determine whether Section 5-401(e), under which Detective McNally conducted the search in question, remains unconstitutional. The Appellate Court did not disturb the trial court's findings that Officer McNally exceeded the scope of his authority in conducting the search.

On remand, the court reiterated that the search authorized by Section 5-401(e) was a "two-step" process and found that Detective McNally exceeded his authority under the statute. Detective McNally conducted a search of the entire business premises that was not limited to a verification of the records. The trial court found that Detective McNally was handed a piece of paper by Defendant Lucas[4] that listed certain vehicles. It

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[4]Judge Hogan mistakenly referred to Defendant Lucas as Defendant Krull in making certain findings of fact. That error was brought to the Court's attention and the Court corrected the

was based on this record that Detective McNally conducted the "verification" or "search" authorized by the statute. (J.A. 29). The trial court also reiterated its previous finding that Detective McNally's search was not a consent search. (J.A. 30).

The trial court further held that the Illinois Legislature brought the old statute in conformity with the Donovan decision in that the new amendments to the statute spelled out "what is the reasonable process of inspection of the premises". In so concluding, the trial court specifically adopted the reasoning of the District Court in finding the original statute unconstitutional and concluded that the new legislation provided the remedy for the unconstitutionality of the old statute. The trial Court thus concluded that the predecessor statute was unconstitutional.

The trial court then addressed the issue of the good faith exception to the exclusionary rule. The trial court concluded, inter alia, that the decision in Illinois v. Gates, 462 U.S. 213 (1983) was distinguishable because the "good faith" exception to the exclusionary rule did not apply to a situation where the statute authorizing the administrative search negated the warrant requirement in the first instance. Gates specifically addressed the situation where an unlawful search was conducted pursuant to the issuance of a search warrant. (J.A. 32). The State then appealed directly to the

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error. (J.A. 30).

Supreme Court of Illinois.

In affirming the trial court, the Illinois Supreme Court rejected the State's arguments that are now being urged upon this Court. The Illinois Supreme Court rejected the State's attempt to compare the present case to Michigan v. DeFillippo, 443 U.S. 31 (1979) wherein this Court upheld an arrest made pursuant to an ordinance which subsequently was found to be invalid. The Illinois Supreme Court pointed out that this Court of the United States continues to utilize the "substantive-procedural dichotomy" in determining whether a search conducted pursuant to an unconstitutional statute is invalid. The Illinois Supreme Court concluded that good faith reliance on a statute defined as "procedural" in nature will not cure an otherwise illegal search. People v. Krull, 107 Ill.2d 107, 118-119 (1985). Notably, the "substantive-procedural" analysis set forth in Michigan v. DeFillippo was reaffirmed by this Court in United States v. Leon, 468 U.S. 897 (1984), a case relied upon by Petitioners.

SUMMARY OF ARGUMENT

A. In Kolender v. Lawson, 461 U.S. 352, 362 f.n. 1 (1983), Justice Brennan stated that "...we have long recognized that the government may not 'authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct'."

The principles of the good-faith exception to the exclusionary rule, articulated in connection with the good-faith reliance of a police officer upon a particular search warrant issued by a detached neutral magistrate, do not apply to the instant case at all.

The issue here is whether a legislature may abrogate on an industry-wide basis a citizen's Fourth Amendment rights, protections and privileges through the enactment of an unconstitutional regulatory inspection scheme. This Court has unequivocally answered the question in Michigan v. DeFillippo, 443 U.S. 31 (1979) and in United States v. Leon, 468 U.S. 897 (1984):

> We have held, however, that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants. Leon at 912 f.n. 8.

The rationale supporting the application of the good-faith exception

to the exclusionary rule does not apply with equal force to constitutional errors promulgated by the legislative branch of government in enacting procedural statutes.

B. The findings of fact made by the trial court were undisturbed on appeal. The trial court held that in conducting the instant search the police officers acted beyond the scope of the authority granted by Section 5-401(e). This inspection statute only permitted officers to check the records of certain business establishments and then to conduct a search limited to the verification of the accuracy of those records. Instead, police officers conducted a warrantless, wholesale inspection of the entire premises. The trial court also found, and the State stipulated, that the search was not a consent search.

Therefore, assuming, arguendo, that this Court determines that the good-faith exception to the exclusionary rule should apply to searches conducted pursuant to procedurally unconstitutional statutes, as in the instant case, the decision granting the motion to suppress should not be reversed. The police officers did not conduct the search in good faith because they failed to execute the search within the permissible limits authorized by the inspection statute.

ARGUMENT

I. THE FOURTH AMENDMENT PRINCIPLE THAT THE EXCLUSIONARY RULE REQUIRES SUPPRESSION OF EVIDENCE OBTAINED IN SEARCHES CARRIED OUT PURSUANT TO STATUTES, NOT YET DECLARED UNCONSTITUTIONAL, PURPORTING TO AUTHORIZE SEARCHES AND SEIZURES WITHOUT PROBABLE CAUSE OR SEARCH WARRANTS, SHOULD NOT BE OVERRULED.

The decision of the Illinois Supreme Court consistently applied an unbroken line of authority recently reaffirmed by this Court. That authority stands for the proposition that the exclusionary rule applies to suppress evidence where the state statute, not previously declared unconstitutional, purports to authorize searches and seizures without probable cause or search warrants.

The Illinois Supreme Court relied on this Court's decision in Michigan v. DeFillippo, wherein this Court specifically ruled that a search will not be upheld where made pursuant to a procedural statute not yet declared unconstitutional, and which authorizes unlawful searches, even though the arrest and search were made in good faith reliance on the statute. The "substantive-procedural dichotomy" analysis articulated by this Court was applied by the Illinois Supreme Court in analyzing the law and facts in the instant case.

The Illinois Supreme Court stated:

In holding the search constitu-

tional, however, the Supreme Court in DeFillippo distinguished between substantive laws, which define criminal offenses, and procedural laws, which directly authorize searches. An arrest and search conducted pursuant to a substantive law like the Detroit ordinance will be upheld provided the officer has probable cause to make the arrest and he relied on the statute in good faith. In contrast, an arrest and search made pursuant to a procedural statute, not yet declared unconstitutional, and which authorizes unlawful searches, will not be upheld, even though the arrest and search were made in good-faith reliance on the statute. (443 U.S. 31, 39, 61 L.Ed.2d 343, 351, 99 S.Ct. 2627, see, e.g., Torres v. Puerto Rico, (1979), 442 U.S. 465, 61 L. Ed.2d 1, 99 S. Ct. 2425...The court continues to utilize the substantive-procedural dichotomy in determining whether a search conducted pursuant to a statute was valid. United States v. Leon, (1984), 468 U.S. 897, 911-913, 82 L.Ed.2d 677, 691, 104 S. Ct. 3405, 3415-16; see e.g., Ybarra v. Illinois (1979), 444 U.S. 85, 62 L. Ed.2d 238, 100 S. Ct. 338.

Section 5-401(e), unlike the Detroit ordinance in DeFillippo, did not define a substantive criminal offense. Rather, it directly authorized warrantless searches. Thus section 5-401(e) is included in the category of statutes which the Supreme Court has defined as

procedural. Any good-faith reliance on such a statute will not cure an otherwise illegal search. See, e.g., Almeida-Sanchez v. United States, (1973), 413 U.S. 266, 37 L. Ed. 2d 596, 93 S. Ct. 2535; Sibron v. New York, (1968), 392, U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889; Berger v. New York, (1967), 338 U.S. 41, 18 L. Ed.2d 1040, 87 S. Ct. 1873. People v. Krull, 107 Ill.2d 107, 118-119 (1985).

Notably, the Illinois Supreme Court relied on the reasoning of the Leon decision, to support its holding. In Leon, this Court reaffirmed the principles enunciated previously in Michigan v. DeFillippo stating:

> We have held, however, that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants. See, e.g., Ybarra v. Illinois, 444 U.S. 85, 100 S. Ct. 338, 62 L.Ed.2d 238 (1979); Torres v. Puerto Rico, 442 U.S. 465, 99 S.Ct. 2425, 61 L.Ed.2d 1 (1979); Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973); Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). Those decisions involved statutes which by their own terms authorized searches under the circumstances

> which did not satisfy the traditional warrant and probable-cause requirements of the Fourth Amendment. Michigan v. DeFillippo, 43 U.S. 31, 39 (1979). The substantive Fourth Amendment principles announced in those cases are fully consistent with our holding here. Leon, 468 U.S. at 912 f.n. 8.

The Petitioner relies heavily on the Leon decision in support of its argument. At the same time, Petitioner and the Amicus ignore the fact that this Court expressly reaffirmed the principles of Michigan v. DeFillippo in the Leon decision.[5] Therefore, in order to adopt the Petitioner's argument, this Court must overrule its decisions in a long line of cases standing for a contrary proposition of law.

An examination of Petitioner's arguments in favor of reversing stare decisis in this case reveals nothing more than public policy arguments. However, these public policy arguments are grounded on faulty and unsubstantiated factual premises.

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[5]At one point in the Petitioner's brief, it attempts to misquote the precise language of Leon by substituting the word "statute" for "warrant." (Pet.'s brief at 12). The substitution hardly would comport with the true intent of the remainder of the opinion, not addressed by Petitioner, which reaffirms the substantive-procedural dichotomy.

First, Petitioner argues that because the Legislature "infrequently" enacts unconstitutional statutes which abrogate a citizen's constitutional rights, as did the statute in the instant case, that there is no need to control the Legislature with the threat of a punitive sanction. (Petitioner's Brief at 11). The argument really misses the mark.

A single Legislative enactment may result in numerous and repeated abuses of citizens' constitutional rights, particularly where the statute is designed to regulate an entire industry. After hearing evidence in the Bionic Auto Parts case, the District Court specifically found that searches conducted pursuant to Section 5-401(e) abused the rights of licensees, their agents and employees on an industry-wide basis. The District Court held:

> Indeed we need not speculate here as to 'unbridled discretion' and its exercise. Evidence during the preliminary injunction hearing showed that searches of premises were often made by the enforcement officers without the predicate or even pretense that they were simply corroborative of the record-keeping requirements. Totally without warrant (both literally and figuratively), the officers conducted inventory searches extending over many hours and placed indelible markings on various of plaintiffs' auto parts. On another occasion they entered a licensee's premises in a claimed search for a law

> violator without a warrant and without any semblance of a showing of probable cause. It is clear that they viewed licensees as fair game, engaged in an activity that in their view was almost malum in se (Tr. 29: 'I licensed you. I can go anywhere I want.'). Bionic Auto Parts, 518 F. Supp. at 585-586.

Indeed, the Petitioner, in its own brief, acknowledges this point. "A search or seizure made pursuant to an individual warrant will typically not be repeated, searches authorized in pervasively regulated industries will by definition occur more frequently...". (Petitioner's brief at 11, f.n. 3). This point is a critical distinction between the application of the good faith exception to a mistake made by a magistrate in issuing a single warrant without probable cause and the conduct of the Legislature in enacting an unconstitutional procedural statute.

When the Legislature abrogates the Fourth Amendment rights of an identifiable group of citizens by the enactment of a regulatory statute designed to remove the protections afforded by the warrant and probable cause safeguards, the violation arising out of an unconstitutional statute repeats itself with each and every search conducted day after day. There is nothing in the decisions of this Court or any other court which supports as a matter of law the repeated abuse, on an industry-wide basis, of citizens' Fourth Amendment rights.

Justice O'Connor specifically

recognized such a limitation on the scope of the application of the exclusionary rule where such widespread abuse was present. In I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 104 S.Ct. 3479, 3490 (1984), Justice O'Connor stated:

> Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread. C.f. United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, (BLACKMUN, J., concurring).[6]

In the instant case, the Court need not speculate regarding the abuse of licensees on an industry-wide basis. The findings of the District Court based upon an evidentiary hearing leave no room for doubt.

Second, Petitioner argues that even if some sanction or remedy should be formulated to address these abuses, the remedy should be one which denies a litigant the right to raise the issue by way of a motion to suppress. Instead, the litigant should be required to file a new declaratory judgment action because the citizen whose rights have been

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[6]Justice Blackmun, concurring in Leon, specifically observed that the scope of the exclusionary rule "is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom." Leon, 468 U.S. at 928.

violated has the "financial ability to seek declaratory or injunctive relief as did the association of auto yards in the [district court case]." (Petitioner's Brief at 11, f.n. 3).

By this argument, the Petitioner would have this Court improperly parse out a remedy based on a citizen's ability to pay for justice. Such an argument blatantly flies in the face of every principle upon which this country was built.

Third, both the Petitioner's and the Amicus briefs point to the importance of the remedial purpose sought to be protected by the enactment of this particular regulatory scheme. The District Court, the Illinois Appellate Court and the Illinois Supreme Court had no quarrel with this proposition. The Petitioner argues, however, that the remedial purpose of the statute is interfered with by application of the principles of the exclusionary rule. The argument is premised upon an inaccurate factual analysis.

First, the briefs of the Petitioner and Amicus incorrectly argue that there were no industry abuses here and therefore, the remedial aspects of the legislation should not be interfered with by the application of the exclusionary rule. Contrary to these assertions, the District Court opinion points out that this particular legislation led to repeated abuses in the industry.

Second and more important is the fact that the Illinois legislature

followed the advice of the District Court[7] and re-enacted the statute to remedy the constitutional deficiencies set forth in the District Court opinion. In so doing, the State Legislature demonstrated its ability to simply and quickly re-enact the statute to conform to the constitutional requirements of the Fourth Amendment. The State Legislature even "beat" the Seventh Circuit to the proverbial punch by re-enacting the legislation prior to the Seventh Circuit deciding the question on appeal. Therefore, the remedial purpose of the statute was preserved and with the exception of the short hiatal period needed to re-enact this legislation, the

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[7]The District Court stated:

This decision may well represent a Pyrrhic Victory for Plaintiffs. Justice Stewart was plainly right in his Donovan dissent in concluding that it charts the route by which a legislature may supersede the Fourth Amendment on an industry by industry basis (452 U.S. at 609, 101 S.Ct. at 2543). Thus, the Illinois General Assembly can overcome any constitutional infirmity if it simply amends the Act by following the Donovan road map (as amplified in this decision). Bionic Auto Parts, et al., v. Fahner, et al., 518 F.Supp. 582, 586 at f.n. 3 (N.D. Ill. 1981).

industry continued to be regulated.[8]

Further, the Petitioner and the Amicus briefs argue that good faith reliance on a presumptively constitutional statute should prevent a citizen from effectively vindicating his constitutional rights by use of the suppression remedy. There are several "presumptions" in this argument that fail to withstand scrutiny.

First, there was no strong presumption of constitutionality with respect to the statute in question. In its discussion of the case People v. Allen, 407 Ill. 596 (1950), the Petitioner attempts to argue that the statute had withstood numerous prior constitutional assaults.

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[8]Even the legislature did not intend to question the District Court's judgment that the statute was indeed unconstitutional. However, the Petitioner attempts to argue that the District Court incorrectly applied the "Colonnade-Biswell exception" to the issue of constitutionality. (Pet.'s Brief at 18-20). Respondents are content to rely on the District Court's lengthy and well-reasoned decision in this regard. Respondents likewise agree with the Seventh Circuit's ruling when it declined to review the constitutionality of the old statute because the legislature re-enacted the legislation. In raising the constitutional issues here, Petitioner improperly is engaging in a collateral attack upon the Seventh Circuit's determination.

Yet in the State's brief before the Illinois Supreme Court, the State was constrained to admit that the issue of the constitutionality of Section 5-401(e) had not previously been ruled upon by the Illinois Supreme Court. In fact, a careful reading of Allen demonstrates that the issue was not even considered by the Supreme Court. Allen is further distinguishable from the instant case in that:

1. The search in Allen was not conducted pursuant to Section 5-401(e);

2. The issue of the constitutionality of Section 5-401(e) was not raised in Allen; and

3. The Allen search was a consent search whereas the trial court found that there was no consent in the instant case.[9]

Indeed, at the time police officers conducted the instant search, the Chicago Police Department had been named as a party in the District Court proceedings wherein the constitutional validity of this particular statute was at issue. The State was clearly on notice with

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[9]The only other case cited by the Petitioner to support its assertion that Section 5-401(e) has withstood constitutional attacks was People v. Levy, 370 Ill. 82 (1938). Again, Levy involves a different statute and not Section 5-401(e).

respect to this matter.

Moreover, the Illinois legislature was put on notice by this Court in DeFillippo and Leon that if a procedural statute directly authorizing an unconstitutional search was enacted, the fruits of the search and seizure would be suppressed. The legislature even was provided a roadmap by this Court in Donovan v. Dewey, 452 U.S. 594 (1982); Marshall v. Barlows, 436 U.S. 307 (1978); and Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) to enable it to reach a constitutional destination.[10]

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[10]In Leon, this Court never intended to create an exception that would emasculate the rule. Suppression remains an appropriate remedy in four situations: (1) if the affiant provides information he knows or should know is false; (2) if the magistrate wholly abandons his judicial role; (3) if the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) if the warrant is so facially deficient that executing officers cannot reasonably presume it valid. Leon, 468 U.S. at 923. As a practical matter, the Petitioner and the Amicus argue at length that a police officer always relies in good faith on a statute because it is presumptively constitutional. On that basis, a police officer never could engage in bad faith. Thus, the good-faith exception to the exclusionary rule applied in the context of the instant case becomes the rule and evidence never will be excluded.

Thus, the critical focus here is not whether a police officer reasonably relied on a legislative enactment, but whether the legislature did its job when it chose to remove the protections afforded every citizen by the warrant and probable cause protections and substitute its own regulatory scheme. The requirements of a warrant and probable cause insulate a citizen from the legislative branch of government. The application of these protections by a detached and neutral magistrate is a further safeguard to protect the citizen's Fourth Amendment rights. However, where the legislature abrogates the protections of the Fourth Amendment and the supervision of the judiciary, it must be held to the higher standard articulated by this Court in DeFillippo and Leon. This is simply not the case where a detached neutral magistrate, applying constitutional safeguards of a warrant and probable cause, makes a bad judgment call with respect to a single probable cause determination that is subsequently relied upon by a police officer in good faith. Indeed, the statutory scheme is designed to abandon the role of a neutral and detached magistrate.

The Petitioner and Amicus simply ignore one of the policies underlying the exclusionary rule. In Dunaway v. New York, 442 U.S. 200, 217-218 (1979), this Court recognized that the use of evidence obtained in violation of constitutional rights is excluded not only as a deterrent to police conduct, but also because the use of such tainted evidence "is more likely to compromise the integrity of the courts." Thus, when the Supreme Court

concluded in DeFillippo and Leon (which cites the Dunaway opinion, Leon, 468 U.S. at 911, f.n. 7), that the exclusionary rule applied to suppress evidence obtained pursuant to procedural statutes that authorized searches under circumstances which did not satisfy traditional warrant and probable cause requirements of the Fourth Amendment, the focus was not at all upon the deterrence policy of the rule. The focus implicitly rested upon the protection of the integrity of the courts and the sanctity of the Constitution.

The point advocated by the Respondents is not whether exclusion of the evidence alters the behavior of police officers one way or another. The point is, and one which repeatedly has been found by the trial court through the Illinois Supreme Court, that the principles of the good faith exception to the exclusionary rule and all the arguments about good or bad police conduct that are attendant to that rule do not apply here at all.[11]

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[11]Both the Sixth and Ninth Circuits have held that the "good faith exception" to the exclusionary rule does not apply beyond the warrant context. United States v. Merchant, 760 F.2d 963, 968 at f.n. 6 (9th Cir. 1985); and United States v. Morgan, 743 F.2d 1158, 1165 (6th Cir. 1984); See also, United States v. Rule, 594 F.Supp. 1223, 1247 (D.C. Me. 1984) for the proposition that a "prosecutor may not usurp the Magistrate's function, and where the court determines that such conduct has occurred, the effect of that

Simply stated, the good faith exception by its own terms is a doctrine intrinsically tied into the requirement of a warrant and the law enforcement officer's conduct with respect to the execution of that warrant. The Leon decision defines the good faith exception and the "objectively reasonable" standard with a view toward incorporating the requirement of review by a detached and neutral magistrate. This particular exception, defined as such, does not apply in the context of a procedural statute that authorizes a search procedure that abrogates the judicial review requirement. Petitioner's analysis is simply inapposite.

Justice Brennan further elucidated this distinction between unlawful police conduct on the one hand and an unconsti-

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conduct is not to be vitiated by the prosecutor's subjective good-faith state of mind." This same argument applies with equal force to the role of the legislature; and United States v. Guarino, 610 F.Supp. 371, 378-39 (D.C. R.I. 1984) for the proposition that an officer's conduct does not satisfy the "objectively reasonable" standard set forth in Leon in light of the known requirement that the Magistrate first engage in the review process. The statute in the instant case abrogates the Magistrate's role and therefore, it is impossible to apply the same "objectively reasonable" standard in the context of this case.

tutional state law on the other in the case Kolender v. Lawson, 461 U.S. 352, 362, f.n. 1, (BRENNAN, J., concurring):

> We have not in recent years found a state statute invalid directly under the Fourth Amendment, but we have long recognized that the government may not "authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." Sibron v. New York, 392 U.S. 40, 61, 20 L.Ed.2d 917, 88 S.Ct. 1889, 44 Ohio Ops2d 402 (1968). In Sibron, and in numerous other cases, the Fourth Amendment issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The question thus has always been whether particular conduct by the police violated the Fourth Amendment, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. (Citations Omitted). It goes without saying that the Fourth Amendment safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who are.

In response to this argument, Petitioner weakly argues that the Legislature knows that if its statute fails to survive judicial scrutiny, that the "condemnation of its actions [will] be highly visible" and the "laborious process of legislative creation must begin anew." (Petitioner's Brief at 12).

Respondents find it impossible to believe that the average citizen in the State of Illinois or the City of Chicago has knowledge about this particular case or the fact that the regulatory statute was struck down. This particular statute is not one that would be subject to common knowledge. The citizens elect legislators to ensure that they do not have to look over their shoulder every time a new statute is passed. The citizens also have faith in their judicial system that a law abrogating their constitutional rights will be struck down.

As for the "laborious process" referred to by Petitioner, the Illinois legislature was able to re-enact the legislation before the case was argued on appeal. Neither one of Petitioner's "safeguards" serve to protect the citizen or provide a remedy for a violation of rights. Without the ability to appear before a neutral judge and move to suppress evidence, the citizenry is left without any remedy.[12]

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[12]The importance of preserving the distinct role of the judiciary in reviewing the conduct of the legislature

Moreover, once the unconstitutional statute is re-enacted to conform to the requirements of law, the citizen no longer has the suppression remedy available to him. Therefore, the State's argument that new crimes will go unpunished is disproved by the very facts in this case.

Finally, the case law cited by the Petitioner does not support its argument. Petitioner specifically relies on this

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and the impact of legislation on the rights and privileges of the citizenry was articulated by the Founding Fathers of this Nation. Alexander Hamilton in The Federalist Papers, No. 81, wrote:

> From a body [the legislature] which had had even a partial agency in passing bad laws we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to operate in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in the character of judges. At 483.

Thus, Petitioner's philosophy that the embarrassment of the legislature at passing a "bad law" provides a sufficient safeguard to protect the citizenry in lieu of a motion to suppress was rejected at least as early as 1787.

Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973) and other "good faith" border search cases such as United States v. Peltier, 422 U.S. 531 (1975). However, this Court explicitly stated in DeFillippo, 443 U.S. at 31, in reviewing its decision in Almeida-Sanchez that, where the federal statute permitting border searches within a "reasonable distance" of the border was declared unconstitutional, the search was held invalid despite the fact that the statute had not been declared unconstitutional at the time of the search.

The public policy arguments asserted by Petitioner do not provide a sufficient basis for this Court to reverse its decision in Michigan v. DeFillippo; United States v. Leon; and Kolender v. Lawson. The rationale supporting the application of the good-faith exception to the exclusionary rule does not apply with equal force to the constitutional errors promulgated by the legislative branch of government in enacting procedural statutes.

2. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY WHERE POLICE OFFICERS OBTAIN PHYSICAL EVIDENCE WHILE CONDUCTING A WARRANTLESS SEARCH PURSUANT TO AN UNCONSTITUTIONAL PROCEDURAL SEARCH STATUTE, AND WHILE CONDUCTING THE SEARCH, THE OFFICERS EXCEED THE BOUNDS OF THE UNCONSTITUTIONAL STATUTE.

Contrary to the assertions contained in Petitioner's brief and the supporting Amicus, at no time did the trial court hold that the conduct of the police officers in executing the instant search was a "permissible activity." (Petitioner's Brief at 5). The trial court expressly held that the officers exceeded the authority of the statute regardless of its constitutionality. (J.A. 29).[13] The court further held that the search

[13]The Amicus brief completely ignores this fact and the fact that the Supreme Court of Illinois specifically held that the search exceeded the scope of the officer's authority. People v. Krull, 107 Ill.2d at 120. The Amicus treats this as an unresolved factual dispute to be examined on remand. (Amicus at 28 f.n. 11). The argument is contradicted by the record in this case. The Amicus goes on to speculate that if the search had been conducted under the newly-enacted statute, that it would have been constitutional. There is absolutely no support for this argument in the record and it is clearly not supported by the opinion of the Illinois Supreme Court in this case.

was not a consent search. (J.A. 20, 30). Indeed, the State stipulated that search was not a consent search. These findings of fact were not disturbed on appeal. Nor should this Court reconsider the factual findings of the trial court. A trial court's determination on a motion to suppress evidence will be overturned only if it is manifestly erroneous. People v. Haskins, 101 Ill.2d 209 (1984); People v. Long, 99 Ill.2d 219 (1983). No argument was made in the appellate court that this finding was manifestly erroneous or even in error. Therefore, the Petitioner must be bound by the record as it stands.

Specifically, the trial court found the following facts:

> He [Detective McNally] was there to conduct an inspection, a license check pursuant to authority granted by the statute, and he asked for the required records, which is commonly known as the police book, which could not be produced at that time. However, Mr. [Lucas] had taken down some notes of vehicles that he had purchased. And it was based on these records then that Detective McNulty conducted his search. I wouldn't call it a search, but a verification.
>
> Had he only verified the four or five vehicles that were indicated on this particular sheet of paper, I think he would have been within his statutory authority; because the statute says first you check the records, then you have the oppor-

tunity to verify the records are accurate. It's a two-step process. Now, he didn't do that.

He took those records, and then he said to Mr. [Lucas], may I look around.

If you recall, my prior finding was that that was not a consent search. Because Mr. [Lucas], I'm sure being in the business, was aware of the officer's authority under the statute, that he had, if you want to call it, the right, or at least the ability to go in there and look around in a certain described manner.

So, Mr. [Lucas] really didn't give him consent. He did not give him consent. (J.A. 29-30), (emphasis added).

Therefore, even assuming, arguendo, that this Court determined that the good-faith exception to the exclusionary rule should apply to searches conducted pursuant to procedurally unconstitutional statutes as in the instant case, the decision granting the motion to suppress should not be reversed.

The police officers acted beyond the scope of the authority of the statute and therefore, were not acting in good faith. Thus, the exclusionary rule would apply to suppress the evidence in this case.

3. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED ON A RETROACTIVE BASIS

On July 5, 1981, the search was conducted by the Chicago Police Department. On July 6, 1981, the District Court determined that the statute authorizing the search was unconstitutional. On September 25, 1981, the State Court granted Defendants' Motion to Suppress. In 1984, this Court decided the Leon case. Petitioner argues that the good faith exception to the exclusionary rule articulated in the Leon decision should be applied retroactively.

Petitioner's argument is simply inconsistent with respect to the retroactivity issue. Petitioner argues on the one hand that the District Court's determination regarding the unconstitutionality of the state statute should not have been applied to a subsequent determination with respect to the motions to suppress because the search occurred prior to the District Court's decision. Thus, Petitioner argues that the district court decision should not be applied retroactively to undecided cases pending before the state court.

On the other hand, Petitioner argues that Leon should be applied retroactively to cases where the issues have been decided by the lower courts prior to the issuance of the Leon decision.

Petitioner's retroactivity analysis is confused. The Courts have generally, although not always, applied decisions retroactively to cases where the issues

before the court have not been decided and not to cases where the issues were fully determined prior to the issuance of a new decision. See, Kirk v. United States, 510 A.2d 499 (D.C. App. 1986) for a more detailed historical analysis of the development of the law in this area. According to the Petitioner's argument, this Court would be required to apply the Leon decision to every case decided prior to the issuance of the Leon decision wherein the trial court granted a Defendant's motion to suppress based upon an erroneous belief that a good faith exception to the exclusionary rule did not exist or did not apply.

However, the analysis extends beyond this simple argument. Indeed, this Court recognized in its decision in United States v. Johnson, 457 U.S. 537, 545 (1982) that its historical practice of "selective awards of retroactivity" was probably not the best practice. In Johnson, the Government argued that all rulings resolving unsettled Fourth Amendment questions should be non-retroactive. The Court rejected this reasoning on the basis that "law enforcement officials would have little incentive to err on the side of constitutional behavior." 537 U.S. at 561.

The Petitioner is now arguing that the Court should apply this Fourth Amendment decision retroactively to empower the trial court to do something that it lacked authority to do at the time that the case was originally before it, to wit: to apply the good faith exception to the exclusionary rule and admit the evidence.

The State Court lacked authority to apply this exception because the Leon decision signalled "a clear break with the past." Johnson, 457 U.S. at 499-50. But even the Leon decision did not decide the issues in the instant case. Indeed, this Court will be required to overrule principles of stare decisis articulated in Michigan v. DeFillippo and Kolender v. Lawson to reach the result urged by the Petitioner. Thus, not only does the decision in Leon represent a clear break from past precedent, but a new decision in this case will also require a clear break from past precedent. This Court has repeatedly declined to apply a fixed rule of retroactivity "where the new rule of law is so clear a break with the past that it has been considered nonretroactive almost automatically." Shea v. Louisiana, 470 U.S. 51, 105 S.Ct. 1065, 1070 at f.n. 5 (1985).

The retroactive application would also result in an "actual" inequitable result to these defendants. See, Johnson, 457 U.S. at 556-57 f.n. 16. In those cases where the state chose not to appeal, the order granting the motions to suppress evidence will remain in full force and effect. Only in this case, where the matter has reached this Court's attention, will the Defendants be required to relitigate their case.[14]

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[14]Of course, the trial court and the Illinois Supreme Court determined that the officers in executing the search did not act within the scope of their statutory authority. The Petitioner has

In the alternative, if this Court were to apply its decision in the Leon case retroactively, Respondent submits that the Court would nonetheless be required to affirm the decision of the Illinois Supreme Court. The Leon decision also reaffirmed the long-standing principle that the exclusionary rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not yet declared unconstitutional, purporting to authorize searches and seizures without probable cause or search warrants. The granting of the good faith exception to the exclusionary rule in Leon was clearly not intended to change this result.

CONCLUSION

Accordingly, Respondents request this Court to affirm the Illinois Supreme Court's decision upholding the suppression of evidence seized pursuant to an

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never appealed the correctness of this factual determination except to collaterally attack those findings here. Thus, even if this Court applied the good faith exception, the officers did not act in good faith.

unconstitutional procedural statute.

Respectfully submitted,

Louis B. Garippo
Louis B. Garippo, Ltd.
100 West Monroe
Room 1800
Chicago, IL 60603
(312)782-4127
Attorney for
Salvatore Mucerino

Miriam F. Miquelon
Miquelon & Associates
3 First Nat'l Plaza
Suite 660
Chicago, IL 60602
(312)853-0100
Attorney for
Albert Krull

James M. Obbish
Kane, Obbish & Propes
100 West Monroe
Suite 1800
Chicago, Illinois 60603
(312)346-8355
Attorney for
George Lucas